82-2098

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MORRIS L. LEWY, et al.,

Petitioners,

- against -

WILLIAM B. WEINBERGER, et al.,

Respondents.

CROSS-PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the judgment entered on consent by the district court and affirmed by the Second Circuit unjustifiably broad in its potential *res judicata* effect and violative of precepts set forth by this Court in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) in that the judgment exceeded the limits of federal court jurisdiction and purported to bind thousands of people who had only state law claims and no federal claims to which such state claims could be pendent and whose claims were pending in state court when, for settlement purposes only, the district court exercised pendent jurisdiction over those state law claims?

2. Where the trial court record was patently inadequate for purposes of review because of the refusal of the trial court to hold an evidentiary hearing regarding the settlement of a class action, can a Circuit Court properly regard as a substitute for the record on appeal the record of a substantially different case?

3. Can the decision in *Weinberger* be regarded as final when the procedural posture is such that (a) a petition for a writ of certiorari has been filed in this case, (b) the opinions below rest upon the presumed validity of a decision of a bankruptcy judge entered in the W. T. Grant bankruptcy proceeding, (c) the

latter decision is on appeal by virtue of a petition for a writ of certiorari filed with the Supreme Court (Docket No. 82-1985) and, therefore, not fully adjudicated, and (d) the district court in this case has not yet ruled or determined the issue of which putative class members have validly excluded themselves from the settlement of this class action by opting out?

LIST OF ALL PARTIES TO THIS PROCEEDING

Cross-petitioners incorporate by reference herein the parties listed in the Petition filed by I. Walton Bader in this proceeding (Docket No. 82-1869). Cross-petitioners are 582 objectors to the settlement of this class action on behalf of whom the firm of Brewer & Soeiro appealed the decision of the district court to the United States Court of Appeals for the Second Circuit. The names of the objectors are attached to the Appearance Form of Attorney Bradley R. Brewer, mailed to the Court on June 15, 1983.

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CROSS-PETITION FOR A WRIT
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COURT OF APPEALS FOR THE SECOND CIRCUIT

Cross-petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for the reasons detailed in the petition of I. Walton Bader, Esq. (Docket No. 82-1869), filed on behalf of Morris L. Lewey, et al., and for the reasons set forth below.

DECISIONS OF THE COURTS BELOW

See petition for a writ of certiorari of I. Walton Bader filed on behalf of Morris L. Lewy, et al. (referred to as the "Lewy petition") at pages 2-3.

TIME PERIODS INVOLVED

See Lewy petition, at page 3. The

Lewy petition was received by mail by counsel for the cross-petitioners herein on May 25, 1983. This cross-petition is being filed within 30 days of receipt of the Lewy petition and is, therefore, timely.

JURISDICTION OF THE COURT TO HEAR THIS PETITION

This Court acquired jurisdiction to hear the petition pursuant to 28 U.S.C. 1254(1). This cross-petition is filed pursuant to The Supreme Court Rules, Rule 19.5.

STATUTES, RULES AND OTHER MATTERS INVOLVED IN THIS PETITION

See Lewy petition, at page 3 and appendix thereto.

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Set forth above.

STATEMENT OF THE CASE

Cross-petitioners pray that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Second Circuit entered in this case on July 14, 1982, and January 26, 1983. Cross-petitioners' motion for rehearing was finally denied on February 22, 1983. In its opinion below, the circuit court affirmed a decision by the district court (S. D.N.Y., K.T. Duffy, J.), dated August 13, 1981, and a judgment in which the district court approved as fair and reasonable the settle-

ment of this securities class action. The amount of settlement approved by the district court was $2.84 million and was entered into between counsel for the class plaintiffs in this case and the settling defendants.*

This securities class action arose out of the affairs and collapse of the W.T. Grant Company. It was initially a federal securities action only, but state common law claims were subsequently added.

The cross-petitioners herein objected to the settlement in the district court because their rights as tort claimants against the settling defendants are adversely affected by the judgment and by its potential res judicata effect upon related litigation pending in the courts of the State of New York.

The First Complaint

Weinberger et al. v. Kendrick, et al. (referred to herein as "Weinberger") was

* The "settling defendants" are: J.P. Morgan, Inc., Morgan Guaranty Trust Company of New York (individually and as agent for 27 other banks), The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Irving Trust Company, Marine Midland Trust Company, Bankers Trust Company, Manufacturers Hanover Trust Company, the Bank of New York, The Sanwa Bank, Ltd., W.T. Grant Company (a bankrupt corporation) and its successors and DeWitt Peterkin (a former officer and director of Morgan).

commenced as a class action under §10(b) of the Securities Exchange Act of 1934 on 10-3-75, the day after W.T. Grant Company ("Grant") filed a petition under Chapter XI of the Bankruptcy Act. The first complaint alleged tortious violations of §10(b) and Rule 10b-5 arising out of unlawful collusion over a period of approximately 32 months before Grant's Chapter XI filing between Grant's management and a group of Grant bank lenders led by Morgan Guaranty Trust Company of New York ("Morgan"), Chase Manhattan Bank, N.A. ("Chase") and Citibank, N.A. ("Citibank") pursuant to which numerous material and adverse facts concerning the financial condition and performance of Grant were concealed from Grant's stockholders and bondholders and from those who purchased Grant's securities during the period of the alleged conspiracy.*

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* At the beginning of the conspiracy in 1973, Morgan held over one million shares of Grant's common stock which it wished to "unload" on an uninformed securities market before facts known to Morgan concerning Grant's poor earnings results became known to the public. Later on (beginning in the summer of 1974), the banks prevented disclosure of Grant's insolvent financial condition and delayed its bankruptcy filing so that they could obtain liens and other contractual rights that would give them a potential advantage over other unsecured creditors in the event of reorganization or liquidation proceedings under the Bankruptcy Act.

The first complaint in this action purported to state only a federal claim for violation of §10(b). That complaint was dismissed by the trial court on its face as against all defendants under Rule 9, F.R. Civ. P., for failure to state a viable claim.

The Second Complaint

The second complaint (called the Second Amended Complaint)* shared a weak point with the first one: it contained no allegation of specific facts or events from which "scienter" or intent to defraud or deceive could clearly be inferred on the part of the defendant banks. Since proof of scienter is a requirement for making a case under §10(b) as interpreted in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), and plaintiffs' ability to allege facts from which scienter could be inferred remained a live issue after the second complaint was filed, the defendant banks again moved under Rule 9 for dismissal on the ground that no federal claim under §10(b) had been stated. The second motion to dismiss remained sub judice before Judge Duffy for many months and was, in fact, still undecided on 7-25-80, the date the proposed settlement was filed.

Related State Court Litigation

Prior to 7-25-80, there was no state

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* The Second Amended Complaint superseded a First Amended Complaint that had been filed two weeks earlier.

claim either effectively pleaded or alleged in Weinberger. In addition, there was no pleading or allegation regarding a cause of action under state common law for breach of fiduciary duties by the banks, who were lenders of over $500 million to Grant prior to its petition in bankruptcy and who used their position as Grant "insiders" to upgrade the status of their loans to Grant and to otherwise act contrary to the interests of Grant stockholders and debentureholders. Indeed, the second amended complaint was so deficient in its pleading that the plaintiffs were in serious danger of having that complaint dismissed. Such a weak position at the pleading stage presented no effective threat of serious litigation.

However, there had been pending, since 1975, a related state court class action entitled Lewy, et al. v. Chase Manhattan Bank, N.A., et al., Sup. Ct. N.Y. Co., Index No. 17837-75 (referred to herein as "Lewy") in which were pleaded viable state law tort causes of action for breach of fiduciary duty, common law fraud and conspiracy to commit both. Thus, the causes of action in Lewy were exclusively state law causes of action. The Lewy action was commenced on behalf of common stockholders and debentureholders of Grant who (a) purchased or held their securities between 6-1-74 and 10-2-75, inclusive (the "class period") and (b) suffered a loss thereby.

On the other hand, prior to 7-25-80,

the second complaint in the Weinberger federal class action only encompassed claims of those who purchased or sold securities during the class period.

The Stipulated Settlement and Application for Court Approval in Weinberger

On 7-25-80, the plaintiffs in this action and the settling defendants filed a stipulation signed by counsel for all of them in which those parties all moved for entry on consent, and without notice to any of the plaintiff class members in Weinberger, an order that would do several things, among them: (1) permit the plaintiff to file (as against the settling defendants only and for the purposes of the proposed settlement only) a fourth complaint, called the Consolidated Amended Complaint (2) declare the suit to be a class action (again, as against the settling defendants only and for the purpose of settlement only), the named plaintiffs to be representatives of the class and subclasses of plaintiffs as defined in the complaint, and counsel for the named plaintiffs to be attorneys for the class and all subclasses; and (3) approve settlement of the suit on a class action basis as between the plaintiff class and the settling defendants on terms dictated by the settling defendants and accepted by counsel for the named plaintiff.

On 7-29-80, Judge Duffy entered an order in the form suggested by the moving parties. In that order, the court fixed 1-24-81 as the deadline for class members to "opt out" of the class (i.e., submit written requests to be excluded), 2-4-81 as the deadline for class members to file objections to the proposed settlement, and 2-18-81 as the date for the hearing on the motion (by both plaintiffs and settling defendants) for approval of the settlement (the so-called "fairness hearing").

The order presented on 7-25-80 in Weinberger was presented to Judge Duffy for execution ex parte without any notice to the plaintiff class in Weinberger and without notice to the plaintiffs' attorneys in Lewy or to any member of the class alleged in Lewy.

The order was signed and entered by Judge Duffy soon thereafter, without any opportunity having been provided for any member of the plaintiff class alleged in Weinberger or any member of the plaintiff class alleged in Lewy to be heard as to why such an order should not be entered, or, if entered, should be carefully limited in scope so as not to oust the state court of jurisdiction over state claims not pleaded in Weinberger and parties not covered by its lawful jurisdiction in that case. In addition, despite the fact that a purported settlement had been reached in Weinberger, no class was previously determined

in that action and no notice of the existence of the suit had been given to any of the members of the class of security holders purportedly involved.

The proposed settlement judgment in Weinberger was apparently arranged between the defendant banks and plaintiffs' counsel to duplicate the Lewy action as much as possible in order for the consent judgment in Weinberger to have maximum res judicata effect upon the Lewy case. Lewy was based, from the beginning, upon state law claims of breach of fiduciary duty. These are claims over which the state courts have claimed and exercised particular expertise for over 50 years and which the Supreme Court has held to be a traditional area for the exercise of state court jurisdiction and expertise. There were no breach of fiduciary duty claims alleged in Weinberger until the fourth "consolidated" complaint was filed for settlement purposes only on 7-25-80. By virtue of adding the state claims on 7-25-80, the res judicata effect of the district court's judgment was extended to bind thousands of parties who were not covered by the allegations of the complaint, the amended complaint or the second amended complaint and who, cross-petitioners contend, are not properly within the scope of federal court jurisdiction.

The class was further broadened, contrary to Blue Chip Stamps v. Manor Drug

Stores, 421 U.S. 723 (1975), to include holders who did not purchase or sell during the class period. To that point, those people had no reason to believe that the litigation in any way affected their rights. Indeed, inquiry up to the filing of the collusive "consolidated" complaint would have indicated that the litigation had no impact upon them whatsoever. Thus, additional thousands were sought to be enmeshed by the res judicata net as part of the bargain between plaintiffs and settling defendants.

Motions By Objecting Class Members in Weinberger

By notice of motion dated 1-19-81 returnable on 1-26-81, attorneys Bradley R. Brewer, Seymour Colin and I. Walton Bader moved on behalf of seven named class members for an order vacating the Order With Respect to Class Action Determination and Hearing on Proposed Settlement signed on 7-29-80 and revising that order in certain specific respects.*

* Specifically, the motion requested the following relief: (1) an order vacating the order of 7-29-80; (2) an order limiting the class covered by the action and proposed judgment of settlement to persons who pur-

(footnote continued on next page)

On 1-7-81, a joint motion was mailed to the Clerk of the Southern District of New York by the Attorneys General of Minnesota,

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(footnote continued from previous page. . .)

chased Grant securities during the class period (3-1-73 to 10-2-75) and expressly excluding from the class persons who purchased before the class period [on the basis of Blue Chip Stamps v. Manor Drug Stores, supra]; (3) an order requiring the named plaintiffs and their attorneys to make a motion on reasonable notice for an order designating them, respectively, class representatives and class attorneys (to provide the objectors an opportunity, previously denied, to oppose their authority to act on behalf of the class); (4) an order requiring that an evidentiary hearing be held on the adequacy and fairness of the proposed settlement; (5) an order fixing the deadline for "opting out" of the suit on a date 60 days after the fairness hearing (instead of before the hearing); (6) an order adjourning the fairness hearing to a later date (to allow these and other objectors to prepare for the presentation of evidence at an evidentiary "fairness hearing"); (7) an order fixing the deadline for filing objections to the settlement on a date 10 days before the adjourned "fairness hearing"; (8) an order requiring the settling parties to send to the members of the class at least 15 days before the "opt out" deadline a written statement summarizing the objections to the settlement presented at the "fairness hearing"; (9) an order declining to exercise pendent jurisdiction over state law claims that were pending in state court and had been added to the federal suit after the settlement had been agreed-upon; and (10) an order directing the settling parties to distribute a statement correcting specified defects of disclosure in the statement previously distributed.

Michigan and Illinois representing teachers' pension funds who were class members, having sustained losses on Grant bonds of over $10.0 million. That motion requested: (a) an order directing that the "fairness hearing" scheduled for 2-18-81 be evidentiary in nature, "with full rights of discovery and cross-examination by class members concerning whether the settlement is collusive or otherwise inadequate"; (2) an order postponing the fairness hearing for three months to allow the states to conduct prehearing discovery; and (3) an order making the deadline for opting out 60 days after the filing of an order approving the settlement and allowing those who had previously filed opt-out notices to rescind

that decision.

Both motions were pending on the deadline for "opting out" (1-24-81) and on the deadline for filing objections (2-4-81). Both motions were denied by an endorsement and order dated 2-6-81 in which Judge Duffy (1) refused to vacate the scheduling order filed 7-29-80, to adjourn the "fairness hearing," and to postpone the opt-out deadline until after the fairness hearing; (2) refused to require distribution of a corrected and revised settlement notice; (3) refused (without citing Blue Chip Stamps) to exclude from the class persons who had purchased their Grant securities before the class period; (4) stated the court's intention to exercise pendent jurisdiction for purposes of the settlement over the state claims alleged in the consolidated complaint and described in the proposed judgment of settlement; and (5) stated that "movants may opt out of this action" within ten days after 2-6-81. Thus, the court's reasoning in support of those rulings was that (a) the original scheduling order was adequate and (b) if the objecting class members were dissatisfied with either the procedures set forth in the scheduling order or the amount or terms of the proposed settlement, their recourse was to opt out and bring a separate action. Judge Duffy made no ruling at all on the request made in both mo-

tions (a) that the fairness hearing be made evidentiary in character by court order; (b) that counsel for objecting class members be allowed to conduct discovery before the hearing; and (c) that they be allowed a reasonable period of time in which to conduct such discovery. Thus, objectors had no reason to believe that the fairness hearing would not be evidentiary in nature and that counsel for objectors would be afforded an opportunity to examine under oath the attorneys for the plaintiffs and the settling defendants concerning (a) the nature and results of discovery and (b) the nature and duration of settlement negotiations. Counsel for objectors specifically wanted to examine settling counsel on these subjects because apparently no discovery had been conducted in Weinberger between 1978 and 1980 and whatever discovery had been conducted prior to that time was limited to (a) review of the extensive "Rule 205" examinations conducted by counsel for the trustee in the W.T. Grant bankruptcy proceeding and (b) depositions of three witnesses.

The record in Weinberger does not reveal how thoroughly counsel for the plaintiff class examined the bankruptcy trustee's depositions or what conclusions were reached as the result of such discovery efforts concerning the strength of the claims in Weinberger on the merits. Counsel for cross-petitioners

herein examined those bankruptcy depositions and concluded that the bankruptcy trustee's attorneys did not probe either deeply or very effectively into the facts relevant to the alleged wrongdoing by the defendant banks. Cross-petitioners have, therefore, concluded that the discovery conducted by counsel for the plaintiffs in Weinberger was not extensive or penetrating enough to provide a reasonable basis for (1) taking the case to trial, (2) making an informed decision as to whether the case could or should be tried, (3) assessing the reasonable value of the claims asserted, or (4) negotiating with the defendants from a position of reasonable strength.

The "Fairness Hearing" on 2-18-81

On 9-16-80, five months prior to the deadline for the filing of objections, Bradley R. Brewer, on behalf of the objecting class members, stated in a letter to the court numerous objections to the proposed settlement. Those objections were also contained in the motions filed with the court in January of 1981. Expecting that the fairness hearing would be evidentiary in nature, the firm of Brewer & Soeiro issued trial subpoenas for the production of various relevant documents in the possession of the settling parties.

Papers submitted by counsel for the settling parties in support of the proposed

settlement were not received by Mr. Brewer until 2-17-81, the day before the hearing. Once those papers were received and, for the first time, arguments were presented stating the reasons why the proposed settlement should be approved, Mr. Brewer was able to respond to those arguments, which he did in a memorandum filed and served prior to the hearing and in which he restated all objections to the settlement.

At the hearing, Judge Duffy quashed Mr. Brewer's subpoenas pursuant to motions filed by the settling parties, awarded $5,000 in punitive attorneys' fees against Brewer & Soeiro for issuing such subpoenas, refused to recognize Mr. Brewer or his clients as having any standing to present objections, refused to conduct or to permit an evidentiary hearing, entertained brief remarks in support of the proposed settlement from counsel for the plaintiffs and settling defendants and declared the proceedings closed. The entire "hearing" took no more than 10 minutes. From the point of view of the objectors and their counsel, there was no "fairness" to it.

The Opinion Approving The Settlement and the Judgment

On 3-18-81, Judge Duffy filed an opinion approving the proposed settlement as fair and reasonable and dismissing the claims

against the settling defendants. In that opinion, he stated, incorrectly, that:

> "No objections to the settlement were timely filed. . .At the hearing, certain plaintiffs' attorneys attempted to file late objections and asked the court to waive the deadline for filing such objections. This request was denied."*

Judge Duffy's incorrect statements of fact do not justify his error in (a) refusing to acknowledge the existence of objecting class members who had appeared by counsel and announced their existence and intention to object in letters and motion papers served and filed with the court over a period of time beginning five months before the hearing and (b) refusing to allow counsel for objectors a reasonable opportunity to make a record of their objections at an evidentiary hearing preceded by discovery as required by the holding of Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975). In addition, Judge Duffy did not have before him when he wrote the opinion any estimate of the amount of claims being settled for comparison with the amount of the proposed settlement fund of $2.84 million.

In estimating the likelihood of plaintiffs' success on the merits, Judge Duffy made no attempt to examine either the principles of

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* In its opinion, the Second Circuit subsequently stated that those objections should not have been disregarded by the trial court. Weinberger v. Kendrick, 698 F.2d 61, at 69, fn. 10 (1982).

law applicable to the claims being settled or the nature and probative strength of the evidence acquired through discovery efforts of plaintiffs' counsel. Instead, the district court based its estimate of the plaintiffs' chances of success on the merits exclusively upon two derivative sources: (1) the statements of plaintiffs' counsel presented in support of the proposed settlement concerning the "difficulties" they would confront at trial and (2) "the findings of fact and conclusions of law" entered by Bankruptcy Judge Galgay in the W.T. Grant bankruptcy proceeding. There was absolutely nothing in the opinion indicating that Judge Duffy made any attempt of his own to become familiar with either the applicable law or the available evidence in order to determine the strength of plaintiffs' claims. In no way did Judge Duffy attempt to protect members of the class not present as he was required by law to do.

After the decision, counsel for cross-petitioners objected in writing to entry of any judgment until the status of those whose requests for exclusion had been challenged by certain settling defendants was resolved by a district court order. That objection was ignored and the judgment as proposed by the settling parties was entered on 10-16-81 without any ruling on the challenged

opt-out requests made by hundreds of class members. Because they do not know whether or not they have validly excluded themselves from the class, the status of those class members has been left unresolved.

The determination of the district court was affirmed by the Court of Appeals for the Second Circuit in a lengthy opinion, with the exception that the award of attorneys' fees in connection with service of subpoenas for the fairness hearing was reversed.

REASONS WHY THIS CROSS-PETITION SHOULD BE GRANTED

POINT I

THE JUDGMENT ENTERED ON CONSENT BELOW AND AFFIRMED BY THE SECOND CIRCUIT IS UNJUSTIFIABLY BROAD IN ITS POTENTIAL RES JUDICATA EFFECT AND VIOLATES PRECEPTS SET FORTH BY THIS COURT IN BLUE CHIP STAMPS V. MANOR DRUG STORES

The opinion of the Second Circuit in this case is directly in conflict with this Court's decision in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), in that pendent jurisdiction of the federal courts is claimed in this federal statutory case under United Mine Workers v. Gibbs, 385 U.S. 715 (1966), over many thousands of class members who admittedly have only state law claims

and no federal statutory claim to which those state claims might be argued to be pendent.

In Blue Chip Stamps, this Court held that the only security holders who have claims under §10(b) are those who purchased or sold during the period of time in which the defendant was allegedly making false statements or intentionally withholding material facts. The limits placed by Blue Chip are expressly described in the opinion as limiting the jurisdiction of the federal courts. As it applies to class actions under §10(b), the Blue Chip doctrine means that the class of persons covered by a §10(b) claim can include only persons who incurred losses through the purchase or sale of securities during the alleged "class period," i.e., the time in which the alleged securities fraud was taking place. Persons who purchased before the class period and who were not injured by a purchase or sale during the class period have no claim under §10(b) over which the district court can claim "federal question" jurisdiction.

In entering the judgment below, the trial court erroneously extended the class covered by the judgment to include thousands of persons who purchased before the class period and who therefore clearly had no federal claim under the holding of Blue Chip.

In the Second Amended Complaint and

in Count I of the Consolidated Amended Complaint, the class is carefully limited by the draftsman to the ambit of federal jurisdiction provided in Blue Chip. The class is there defined as "all persons who purchased securities of W.T. Grant Co." during the class period, i.e., "since in or about 1973 to October 1975, the period in which the wrongs complained of herein were committed and continued." However, in Count II of the Consolidated Complaint and in the final judgment, the class of persons bound by the judgment is defined as "persons (with the exception of the defendants) who purchased or held securities of Grant during the period of March 1, 1973 through October 2, 1975, inclusive." (Emphasis added.) That definition clearly includes within the class persons who purchased before the class period and who, therefore, had no statutory claim under §10(b) to which any state law claims could arguably be "pendent."

Likewise, there is absolutely no authority in U.M.W. v. Gibbs, supra, for the exercise of "federal question" jurisdiction over a party plaintiff who concededly has no federal statutory claim as was done in this case and approved by the courts below.

In addition to the clear errors of law described above, the district court

erred and the circuit court erred in condoning the practice of accepting pendent jurisdiction for purposes of the settlement over state common law claims that were pending and being actively litigated in the state courts and that were not alleged in this case until long after the settlement had been agreed upon. As a result, the judgment below will bar, by its res judicata and injunctive effect the subsequent prosecution in state courts of breach of fiduciary duty claims that were not included in the second complaint, were not part of the case when discovery was conducted, and were added to the consolidated complaint only as an afterthought after the settlement had been negotiated and in an effort to include as many plaintiffs in the settlement as possible.

The state claims being prosecuted in the state court Lewy case were much stronger than the §10(b) claims against the banks in Weinberger because (a) proof of scienter is required under §10(b) but not in a breach of fiduciary duty case and (b) in a breach of fiduciary duty case, the burden of proof is upon the defendant fiduciary to prove the fairness of his conduct that resulted in harm to his cestui, whereas the burden is upon the plaintiff in a §10(b) case and scienter would

have been difficult to prove in Weinberger. Although the opinion of the Second Circuit states that appellants therein cited no decisions "in which a fiduciary relationship was found to exist between a bank and its borrower's security holders," such decisions were indeed cited. See Matter of Multiponics, Inc., 622 F.2d 709 (5th Cir. 1980) and In re American Lumber Co., 5 B.R. 470 (D. Minn. 1980). See also Pepper v. Litton, 308 U.S. 295 (1939) and Geddes v. Anaconda Mining Co., 254 U.S. 590 (1921).

POINT II

THE TRIAL COURT RECORD WAS PATENTLY INADEQUATE FOR PURPOSES OF REVIEW BECAUSE OF THE REFUSAL OF THE TRIAL COURT TO HOLD AN EVIDENTIARY HEARING REGARDING THE SETTLEMENT OF THIS CLASS ACTION, AND IT WAS IMPROPER FOR THE CIRCUIT COURT TO SUBSTITUTE FOR THE RECORD ON APPEAL THE RECORD OF A SUBSTANTIALLY DIFFERENT CASE.

The refusal of the trial court in this action to grant objectors an evidentiary hearing regarding the proposed settlement, preceded by prehearing discovery, and the circuit court's affirmance of that refusal has placed the relevant decisional law of the Second Circuit in conflict with the law of the Third Circuit as expressed in Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975) and that of the Seventh Cir-

cuit as expressed in In re General Motors Engine Interchange Litigation, 599 F.2d 1106 (7th Cir. 1979).

Before the "fairness hearing," counsel for the objectors had requested, by formal motion, inter alia, (a) that the fairness hearing be evidentiary in character and (b) that the hearing date be adjourned to allow for reasonable discovery. In doing so they cited In re General Motors, supra, and Girsh v. Jepson, supra. The district court refused to postpone the hearing, failed to rule on the motions for an evidentiary hearing, effectively precluded prehearing discovery, quashed subpoenas for the production of documents at the hearing, and refused to conduct evidentiary proceedings at the "fairness hearing." By doing so, the objectors were effectively prevented or precluded from making an effective appellate record of their objections and the facts relevant thereto.

Had the objectors been allowed to conduct an evidentiary hearing, they would have been able to elicit from the plaintiffs' counsel the most basic information necessary for approval of the settlement, namely: (1) the amount of the best possible recovery on behalf of the class in the event of a victory at trial; (2) the relevant issues of law involved in the trial and the principles applicable thereto; and (3) the most probative ev-

idence bearing on those issues.

Instead of requiring that those basic items of necessary information be placed before him in the record of an evidentiary hearing, the district judge, erroneously, relied upon only two sources of information, both of which were derivative in nature and neither of which constituted "solid facts" as required by this Court in Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968). They were: (1) "bald conclusions" presented by proponents of the settlement* and (b) findings of fact and conclusions of law in a related, but different, bankruptcy matter.

The Second Circuit, in its opinion, countenanced the refusal to conduct an evidentiary hearing by stating that the appellants therein came forward with no specific criticisms of the bankruptcy decision and they had access to discovery materials in this case so the lack of an evidentiary hearing was not error.

Cross-examination of settling counsel would have demonstrated that little dis-

* To the effect that (1) plaintiffs' counsel had conducted "extensive discovery"; (2) settlement negotiations were at arm's length and were not collusive; (3) plaintiffs' claims were "complex" and extremely difficult to prove; (4) "plaintiffs have heavy burdens of proof with respect to each claim" and (5) damages would also be extremely difficult to prove.

covery was conducted in this action. This is especially true with respect to the state claims for breach of fiduciary duties which were added to the settlement as an afterthought without any discovery being conducted with respect to that issue. In fact, the affidavits submitted by counsel for plaintiffs in support of the settlement did not even discuss the breach of fiduciary duty claims in any meaningful detail.

In addition, it was error for the trial court and the circuit court to rely upon the decision of Bankruptcy Judge Galgay in the related W.T. Grant Bankruptcy proceeding. It was clearly improper to substitute the record of the bankruptcy proceeding for the inadequate record in Weinberger.

The reason it was improper to substitute the decision of Judge Galgay instead of the trial court considering, on its own, the nature nature of the claims, applicable law and available evidence, was that the decision of the bankruptcy judge was itself the subject of an appeal in which those appellants argued that Judge Galgay did not review the record in that proceeding in reaching his findings of fact and conclusions of law.

The opinion of Judge Galgay in the Bankruptcy court was challenged by objectors in that proceeding as having merely copied the proposed findings of fact and conclusions of

law submitted by counsel for the trustee and being simply incorrect as to what the factual record contained. It was claimed that the bankruptcy court did not perform the searching review of the record that is required by Protective Committee v. Anderson, supra. In particular, objectors cited a multitude of evidence found in the bankruptcy Rule 205 examinations with which a strong case could be made against the defendant banks demonstrating that they controlled and dominated the affairs of W.T. Grant prior to the filing of its petition in bankruptcy.

The counsel for plaintiffs in this case totally failed to apprise the district court of any of that evidence. Had the objectors herein been permitted at an evidentiary hearing to cross-examine plaintiffs' counsel, they would have shown the available evidence to the attorneys for the plaintiffs and asked them if they were aware of it, and, if not, ask why. By the district court not allowing the evidentiary hearing, there was simply no way to create a proper record. Subsequently, and for those same reasons, the record before the Second Circuit was, likewise, inadequate.

Thus, it was erroneous for the district and circuit courts in this case to rely upon the bankruptcy decision that was under attack and, in fact, the subject of a

separate appeal. Ironically, the legal accuracy of that bankruptcy decision is presently before this Court by virtue of a petition for a writ of certiorari filed on 6-3-83 (Docket No. 82-1985).

POINT III

THE DECISION IN WEINBERGER CANNOT BE REGARDED AS FINAL WHERE THE PROCEDURAL POSTURE IS SUCH THAT (A) A PETITION FOR A WRIT OF CERTIORARI HAS BEEN FILED, (B) THE OPINIONS BELOW REST UPON THE PRESUMED VALIDITY OF A DECISION OF A BANKRUPTCY JUDGE IN A SUBSTANTIALLY DIFFERENT CASE, (C) THE LATTER DECISION IS ON APPEAL BY VIRTUE OF A PETITION FOR A WRIT OF CERTIORARI AND, THEREFORE NOT FULLY ADJUDICATED AND (D) THE DISTRICT COURT HAS NOT YET RULED ON THE ISSUE OF WHICH CLASS MEMBERS HAVE VALIDLY EXCLUDED THEMSELVES FROM THE SETTLEMENT BY OPTING OUT.

It is clear that the procedural posture of this case is such that it cannot be considered as final because of the unique circumstances described in the heading above. Cross-petitioners submit that all of these circumstances, considered together and individually, demonstrate the lack of finality of the Weinberger decision.

A petition for a writ of certiorari was timely filed by I. Walton Bader

on behalf of putative class members who have state claims pending in the courts of the State of New York and who were prosecuting those claims in a class action before the district court in Weinberger took pendent jurisdiction over the entire state class of claimants.

In addition, the opinions of the courts below rest upon the presumed validity of the opinion of Bankruptcy Judge Galgay in the substantially different W.T. Grant Bankruptcy proceeding. Cross-petitioners have maintained that it was error for the courts below to find support in the findings of fact and conclusions of law of the opinion of the bankruptcy court because this latter opinion is, itself, not fully adjudicated. As more fully detailed in Point II of this Cross-Petition, Judge Galgay's decision is factually and legally incorrect in many respects. In reaching that decision, the bankruptcy court merely copied the findings of fact and conclusions of law submitted by the counsel for the bankruptcy trustee. Judge Galgay did not review the extensive record for himself, as he was required to do (Protective Committe v. Anderson, supra). Had he done so (and indeed, had the district court in Weinberger done so) he would have found a substantial body of evidence indicating domination and

control by the defendant banks over the affairs of W.T. Grant.

It was clearly improper for the courts below in Weinberger to presume the validity of Judge Galgay's findings in the bankruptcy proceeding as well as to assume that he reviewed the record before him. Indeed, the record before Judge Galgay is completely at odds with his finding therein.

Moreover, that decision is on appeal by virtue of a petition for a writ of certiorari, filed with this Court on 6-3-83 (Docket No. 82-1985) and is, therefore, not fully adjudicated.

In addition to the above factors, the final judgment entered in Weinberger on 10-16-81, left unresolved, and it remains unresolved to this day, the issue as to which putative class members have excluded themselves from the settlement of this class action by opting out.

As part of the district court's 2-6-81 order denying the relief sought by motion filed on 1-19-81 by Bradley R. Brewer, movants were permitted ten days from the date of the order to opt out if they so chose. On 2-16-81, attorney I. Walton Bader sent a letter to the district court requesting exclusion of certain specified groups of clients represented by Bader & Bader, Brewer & Soeiro and Seymour Colin, P.C. That letter

was accompanied by several lists stating the names of the persons in each category on whose behalf exclusion was requested. Counsel for the settling banks objected to the "opt outs" requested in Bader's letter as ineffective because (a) the letter was filed after the "opt out" deadline of 1-24-81 and (b) the request was made on behalf of persons who were not, technically, "movants" within the intended meaning of Judge Duffy's relevant endorsement decision of 2-6-81. Objections to leaving this issue unresolved prior to the entry of the final judgment were ignored by the district court.

By not ruling on this issue, the district court intentionally left the scope of the res judicata effect of its judgment ambiguous and open-ended.

The Second Circuit in National Super Spuds, Inc. v. New York Mercantile Exchange, 660 F. 2d 9 (2d Cir. 1981) has condemned the practice of intentionally leaving a judgment open-ended and ambiguous. Yet, that is exactly what happened in this case, and the practice was approved by the Second Circuit contarary to its earlier opinions.

As can be seen from the above circumstances, the courts below in Weinberger

have so far departed from the accepted and usual course of proper judicial proceedings as to call for the exercise of this Court's power of supervision.

CONCLUSION

For the reasons set forth above, this cross-petition for a writ of certiorari should be granted.

Dated: New York, New York
June 23, 1983

Respectfully submitted,

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